BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES R. WEBB	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,044,061
HI LO INDUSTRIES, INC.	)	
Respondent	)	
AND	)	
	)	
LUMBERMENS UNDERWRITING ALLIANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals the December 29, 2010, Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded a 13.5 percent functional impairment to the left leg after the ALJ found that claimant had suffered personal injury by accident on December 4, 2008, which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Scott Gordon of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on April 5, 2011.

ISSUE

Did claimant suffer an "injury" pursuant to K.S.A. 2008 Supp. 44-508(e)? Respondent contends that claimant's injury was the result of the normal aging process or was caused by the normal activities of day-to-day living. Claimant contends that the actions leading to the injury are specific to his work situation and, in particular, to the company truck claimant was driving for respondent on the date of accident. The parties have stipulated to a 13.5 percent functional impairment at the level of the leg for the injury to claimant's left knee. The only issue for the Board to determine is whether K.S.A. 2008 Supp. 44-508(e) prohibits an award for claimant.

FINDINGS OF FACT

Claimant had worked for respondent since 1972. His duties included driving trucks, shipping and receiving, and loading trucks. On December 4, 2008, claimant was climbing into a company truck when his left knee popped. Claimant testified that he had to twist in order to get into the company truck. Claimant finished his work that day. Interestingly, claimant was scheduled for a company physical that day. He informed the examining doctor of the knee injury. He also reported the incident to respondent and was referred to the company doctor. An MRI was ordered, and claimant's care was transferred to board certified orthopedic surgeon Lowry Jones, Jr., M.D., on February 9, 2009. At that time, Dr. Jones noted a lateral meniscus tear with mild joint effusion, but no significant arthritis. Claimant was already scheduled for a multilevel cervical fusion on February 16, 2009. Once the cervical surgery and recovery were accomplished, the plan was to proceed with surgery on the left knee.

Claimant underwent a left knee arthroscopy with partial lateral meniscectomy and tricompartmental chondroplasty on June 19, 2009. During the arthroscopy, it was determined that claimant had advanced preexisting arthritis. Claimant was rated at 7 percent permanent partial impairment to the left knee. Dr. Jones opined in his report of November 18, 2009, that the impairment rating was entirely due to the injuries sustained in the course of claimant's employment.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on March 9, 2010. The history to Dr. Prostic was consistent. Claimant had been examined and/or treated by Dr. Prostic on several occasions in the past. However, the prior treatments with Dr. Prostic and other physicians were for claimant's upper extremities and his cervical spine. Claimant had no history of left knee difficulties, which was consistent with claimant's testimony. Claimant was rated at 20 percent permanent partial impairment to the left lower extremity. Dr. Prostic testified that he did not agree with Dr. Jones' assessment that claimant had tricompartmental arthritis which preexisted the date of accident. Dr. Prostic also testified that the type of injury suffered by claimant was consistent with the described accident and the way claimant climbed into the company truck, especially the maneuver of twisting while weight bearing on the knee.

During the regular hearing, claimant testified to the difference between his company truck, his Chevy Avalanche (SUV) at home and his Chevy Silverado (pickup) at home. With the company truck, claimant would step up 18 inches with his right foot. Claimant would then step up an additional approximate 18 inches placing his left foot on the rail on the top of the fuel tank. The rail is approximately 36 inches off the ground. Claimant would then swivel 90 degrees with his left foot planted and place his right foot into the company truck. With the SUV, claimant would step up and slide his right foot into the seat. With the

pickup, claimant would lift his right leg from the ground and slide into the seat. The Silverado pickup does not have a stepside as do the SUV and the company truck.[1]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An

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[1] The step on claimant's 1984 Chevy Silverado (pickup) is 21 inches off the ground. The step on the company truck is 18 inches off the ground. (P.H. Trans. at 18-19) The step on the SUV (the Avalanche) is lower than 18 inches off the ground. (Ibid. at 31.)

[2] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2008 Supp. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

> injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[6]
>
> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[7]

This dispute centers around the act of climbing into the company truck and whether claimant's actions in doing so are the same or similar to the actions required of claimant when climbing into his personal vehicles. It is true that claimant was at work when the injury occurred. However, to be compensable, the injury must be one where the physical structure of the body gives way under the stress of the worker's usual labor. Appellate courts in Kansas have dealt with similar issues in the past. In *Martin*,[8] a back injury suffered when a claimant exited his vehicle when he arrived at work was ruled non-compensable because "almost any everyday activity would have a tendency to aggravate [the] condition." In *Boeckmann,[9] a* worker sought compensation following a back injury which occurred when he stooped down to pick up a tire. The Kansas Supreme Court, in affirming the Board's denial of compensation, agreed with the finding that "there was no difference between stoops and bends on the job or off."[10] The Kansas Court of Appeals, in reversing the Board, held, in *Johnson*,[11] that a knee injury suffered when a worker suffered a meniscal tear while standing up was involved in a "normal activity of daily living" such that the compensation awarded by the Board was reversed and benefits were denied by the Court. The Court found it significant in *Johnson* that the claimant had a history of three or four incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that the claimant's knee appeared to have years of degeneration and it was "just a matter of time".[12]

Here, there is a lack of any preexisting symptoms or complaints by claimant. In fact, claimant testified that he had not had left knee complaints before the date of accident. It

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[6] K.S.A. 2008 Supp. 44-508(e).

[7] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[8] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 300, 615 P.2d 168 (1980).

[9] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 734, 504 P.2d 625 (1972).

[10] Id. at 739.

[11] *Johnson*, *supra*.

[12] Id. at 788.

is acknowledged that both Dr. Prostic and Dr. Jones found preexisting degeneration in the knee. However, this condition appears to have been asymptomatic before the date of accident.

Respondent contends that the actions by claimant in climbing into the company truck are the same or very similar to the actions of claimant climbing into his two trucks at home. However, the testimony of claimant paints a different picture. The company truck requires that claimant step up about 18 inches with his right foot and then step up another 18 inches with his left foot to a rail on the top of the fuel tank. Claimant must then pivot with his left foot while swinging his right foot and leg into the company truck. This pivot motion places added stress on the left knee.

Both Dr. Prostic and Dr. Jones commented on the fact that claimant was getting into the company truck and twisted his knee. This twisting action was noted as being significant in the creation of this injury. This twisting action is also different from the action required for claimant to enter either of his personal vehicles.

The Board finds that claimant's actions in climbing into the company truck are uniquely different from the motions required to climb into either of his personal vehicles. Thus, the defense created by K.S.A. 2008 Supp. 44-508(e) does not apply in this instance. The determination by the ALJ that claimant suffered personal injury by accident which arose out of and in the course of his employment is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed as claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. Claimant's actions in getting into the company truck are not acts of daily living as contemplated by the legislature in K.S.A. 2008 Supp. 44-508(e).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated December 29, 2010, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should

claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.[13]

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[13] K.S.A. 44-536(b).